(12)

No. 89-1905

In The

Supreme Court of the United States

October Term, 1990

WISCONSIN PUBLIC INTERVENOR, and
TOWN OF CASEY,

Petitioners,

vs.

RALPH MORTIER and WISCONSIN
FORESTRY/RIGHTS-OF-WAY/TURF COALITION,

Respondents.

**On Writ Of Certiorari To The
Supreme Court Of Wisconsin**

BRIEF AMICI CURIAE OF THE STATES OF HAWAII, ALABAMA, ILLINOIS, KANSAS, MAINE, MICHIGAN, MISSOURI, NEVADA, PENNSYLVANIA, UTAH and VERMONT IN SUPPORT OF PETITIONERS

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The amici States enumerated above, by their respective Attorneys General, submit this brief in support of reversal of the judgment of the Supreme Court of Wisconsin entered in the proceeding below on March 12, 1990.

INTEREST OF AMICI CURIAE

The amici States have a significant interest in seeing that their authority to regulate the use of pesticides in order to protect the health, safety, and welfare of their citizens can be most effectively utilized by having the option to delegate some or all of their power to regulate pesticide use to local units of government which may have better knowledge of and thus better ability to deal with local problems. The Wisconsin Supreme Court decision, by denying States this option to delegate some regulatory functions to local units of government, may thus hinder every State's ability to most effectively deal with pesticide-related problems. Furthermore, the decision below, by allowing States to regulate pesticide use, but denying States the ability to do some or all of this regulation through its political subdivisions, fundamentally deprives every State of its sovereign right to determine for itself how best to structure its governmental institutions and lawmaking processes.

ARGUMENT

A. FIFRA Fails to Indicate a Clear and Manifest Purpose of Congress to Deprive Local Governments of their Historic Police Power to Regulate for the Health, Safety, and Welfare of their Citizens.

It is undisputed that the historic police powers of the States are not to be superseded by federal legislation unless that is the "clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). This mandate is especially strong in the case at bar

because "the regulation of health and safety matters is primarily, and historically, a matter of local concern." *Hillsborough County v. Automated Medical Laboratories*, 471 U.S. 707, 719 (1985). As discussed below, this case falls far short of indicating anything even close to a "clear and manifest purpose" of Congress to preempt local pesticide regulation, for the statutory language of FIFRA actually supports concurrent regulation by local governments, and, at worst, yields ambiguity.

Generally, this Court has delineated three categories for concluding that preemption is warranted. First, preemption will be found where the statute explicitly provides for preemption in "express terms." *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190, 203 (1983). Second, where the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for supplemental regulation, "implied preemption" will be found. *Pacific Gas*, 461 U.S. at 203-04. Finally, state and local laws are preempted to the extent that they actually conflict with federal law. *Pacific Gas*, 461 U.S. at 204.

It cannot be reasonably argued that either the second or third forms of preemption are warranted in this case. This Court need not even look at the entire FIFRA regulatory scheme to know that Congress did not intend to so occupy the field as to leave no room for supplemental regulation, as FIFRA explicitly allows for supplemental *State* regulation of the "sale or use of any federally registered pesticide or device in the State" provided the State does not permit sale or use prohibited by FIFRA. 7 U.S.C. § 136v(a). Obviously then, Congress in enacting FIFRA did not intend that pesticide regulation was to be

exclusively a federal matter. *See People ex rel. Deukmejian v. County of Mendocino*, 683 P.2d 1150, 1159 (Cal. 1984).

Nor is there any plausible argument that the Town of Casey ordinance, by imposing a permit requirement and allowing limitations on the areas and methods of pesticide spraying, conflicted with FIFRA. That the ordinance may provide for even stricter controls on the use of pesticides than the minimum requirements of FIFRA does not create a conflict. A conflict arises only where "compliance with both federal and [local] regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963), or where the local law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Pacific Gas*, 461 U.S. at 204 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). Neither situation exists in this case. Respondents' argument to the Court below that the Town's ordinance stands as an obstacle to the accomplishment of the objectives of Congress because it would interfere with Congress' alleged intent "that the responsibility for determining pesticide use [ ] be made on at least a statewide basis" is a circular one. For if Congress intended no preemption of local regulation, then there is no intent of Congress that decisions regarding pesticide use be made only on a statewide basis.

Consequently, the only way this Court can find that "clear and manifest purpose" to preempt local legislation is to find in the FIFRA statute language *expressly* and *explicitly* preempting local regulation. No such language exists.

First, there is no language in the entire FIFRA Act that even remotely *expressly* prohibits local government regulation of pesticides. This proposition cannot be and, up to now, has not been disputed by any party to this case. This fact alone should end the inquiry. Given that preemption is not to be inferred in the absence of a "clear and manifest purpose" of Congress to oust supplemental regulation, and the fact that the regulation of health and safety matters is primarily, and historically, a matter of local concern, *Hillsborough County, supra*, Congress' failure to include an express and unambiguous prohibition on local government regulation is fatal to finding preemption under the "express statutory preemption language" category. For surely if Congress intended to *expressly* preempt local regulation, it would have done just that by using language that explicitly preempts local regulation. It was thus improper and, frankly, illogical for the Wisconsin Supreme Court to have delved into the legislative history to find *express* preemption. If the language of the statute was not clear enough on its face to be deemed to have *expressly* preempted local regulation (which even the Wisconsin Supreme Court conceded was the case, calling the language "ambiguous." *See Mortier v. Town of Casey*, 452 N.W.2d 555, 557-58 (Wis. 1990)), there can be no *express* statutory preemption by definition!

Second, if the statutory language of FIFRA says anything at all with respect to local regulation, it is that local regulation is permitted. 7 U.S.C. § 136v(a) specifically provides that *States* "may regulate the sale or use" of pesticides provided they don't permit any sale or use prohibited by FIFRA. Because States often distribute some of their lawmaking or regulatory power to local

governmental units, the reasonable inference from this statutory authorization is that local units may also regulate pesticide use, if the States so choose to delegate some or all of their FIFRA-approved power to local governments.

Thus, the Wisconsin Supreme Court's contrary conclusion is without merit. Assuming that the term "States" in 7 U.S.C. § 136v(a) includes only states and not political subdivisions, 7 U.S.C. § 136(aa), that does not mean that the States may not choose to regulate *through their* subdivisions. *See Professional Lawn Care Ass'n v. Village of Milford*, 909 F.2d 929, 935 (6th Cir. 1990) (Nelson, J., concurring). There is good reason for FIFRA not to directly authorize local governments to regulate, for doing so could mean that local governments would be able to regulate even if the State did not want them to, thereby depriving the State of the right to decide whether or not to delegate its power to the subdivisions. *See County of Mendocino*, 683 P.2d at 1160. To avoid this usurpation of State sovereign power, FIFRA only explicitly authorized the *States* to coregulate, leaving it up to each individual state to decide whether to allocate some of that power to local governmental units.

Even if this Court declines to construe § 136v(a) as an *express approval* of local governmental regulation, § 136v(a) surely does not *expressly disapprove* local governmental regulation. And it is the latter issue that determines preemption because local governmental units possess the inherent power to regulate for the health, safety, and welfare of their people. To find preemption, FIFRA must expressly *take away* their powers. As already noted, § 136v(a) indisputedly does not *expressly* bar local

governmental regulation. And the Wisconsin Supreme Court's argument that § 136v(a) *implicitly* bars it by only granting authority to the States is flawed for three reasons. First, the statute's failure to mention local governments when mentioning states does not mean that local governments are excluded from the authorization based on the statutory maxim *expressio unius est exclusio alterius*. For the maxim simply has no application where the purportedly excluded entity is a subdivision or part of the included entity. *See County of Mendocino*, 683 P.2d at 1160. Second, even if the maxim is applied so that § 136v(a) is interpreted to only authorize states and not local governments to regulate, as discussed in the previous paragraph, that does not mean that the States may not choose to regulate *through* their subdivisions. Finally, even if the failure to include "local governments" in § 136v(a) is taken to mean that only States and not local governments are *authorized* to regulate, that does not amount to a *prohibition* on local government regulation, as such governments, as just mentioned, do not need any congressional authorization to exercise their inherent powers to regulate for the health and safety of their people. *See Mendocino*, 683 P.2d at 1160.

In short, the statutory *language* of § 136v(a) clearly does not establish a "clear and manifest purpose" to preempt local government regulation. At the very most, it simply fails to *explicitly authorize* local regulation. The Wisconsin Supreme Court's need to resort to legislative history itself indicates the failure of Congress to "clearly and manifestly" preempt local regulation. There should be no further inquiry.

However, assuming, arguendo, this Court concludes that resort to legislative history is appropriate, a brief discussion on that matter is warranted. Because the parties will fully discuss the legislative history in their briefs, amici will not further burden the Court with repetition. But amici do note that the legislative history is at best ambiguous, and thus again fails to establish the "clear and manifest purpose" of Congress to preempt.

Even if it was the understanding of the Senate Committee on Agriculture and Forestry that § 136v(a) was meant to preempt local government regulation, that does not indicate that the full Senate, when voting to pass the final bill, had the same understanding. There is nothing in the congressional record to indicate that the full Senate ever discussed the matter of local government regulation.[1]

This distinction is especially significant because the Senate Committee on Agriculture and Forestry's view was not the only interpretation of § 136v(a). There is a strong argument that the Senate Commerce Committee actually viewed the original bill as *not* preempting local government regulation when it stated in a report that the original bill "does not specifically prohibit local governments from regulating pesticides." S.Rep.No. 92-970, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. Code and Cong. &

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[1] Senator Allen's insertion into the Congressional Record of the original report of the Senate Committee on Agriculture and Forestry, 118 Cong. Rec. 32,252-32,256 (1972), is simply irrelevant as that report only directly concerns the original version of the bill, and not the final compromise bill as presented to the floor.

Ad. News 4092, 4111. Respondents may argue, however, that even the Commerce Committee must have viewed the original bill as preempting local government regulation for otherwise they would not have proposed the *amendment* that specifically authorized local regulation. Such an argument, however, must fail because the Commerce Committee was very aware of other committees' contrary view that the bill did preempt local regulation, *see id.*, and thus the Commerce Committee could have seen the amendment as a way of "playing it safe" and ensuring that the final bill is not interpreted to preempt local regulation. Therefore, given the divergent views of the two Senate Committees, the absolute silence of the committee that issued the final compromise bill, *see* 118 Cong. Rec. 32,257-32,258 (1972), and the completely unknown views of the vast majority of Senators and Representatives who actually voted on the final bill, it is plainly wrong to conclude that the Congress "clearly and manifestly" intended anything at all with respect to local governmental regulation.

Furthermore, although the Senate Commerce Committee's proposed amendment specifically allowing local government regulation was not included in the final bill, there is absolutely no indication in the congressional record as to why it was not included. For all we know, it may have been left out because some Senators may have felt it unnecessary, given that the original version did not expressly preempt local regulation. It is just as significant to point out that no express statutory preemption language was ever added to the bill despite the disagreement among the Senate Committees.

Finally, as demonstrated by the above discussion, and as so eloquently argued by Justice Scalia, "[c]ommittee reports, floor speeches, and even colloquies between congressmen . . . are frail substitutes for bicameral vote upon the text of a law and its presentment to the President." *Thompson v. Thompson*, 484 U.S. 174, 191-192 (1988) (Scalia, J., concurring). Resort to the text of the law, and avoidance of manipulable and inconclusive legislative history, especially should be the rule when we are attempting to find preemption by statutory "express terms."

If we heed this warning and look to the statutory *text*, we find further support for the notion that local governments were not preempted from regulating pesticide use. Section 136v(b) states that "[s]uch State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter." Thus, where Congress intended FIFRA to preempt other regulation, it explicitly and unambiguously so stated in the statutory text. The failure of the FIFRA statutory text to similarly expressly and clearly preempt local regulation should thus be seen as indicating an intent not to preempt local regulation, and at worst an ambiguous intent. Either way, preemption cannot be sustained.

Furthermore, although § 136v(b) only prohibits "States" from regulating labeling or packaging, it is obvious that Congress intended by that provision that local governments also be prohibited from regulating labeling or packaging. Any other conclusion would lead to an absurd result. Therefore, the term "States" in

§ 136v(b) must be interpreted to include local governments. It then follows that § 136v*(a)*'s reference to "States" should be similarly interpreted to include local governments, given the "presumption that identical words used in different parts of the same act are intended to have the same meaning." *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 87 (1934); *see also United States v. Cooper Corp.*, 312 U.S. 600, 606-607 (1941). Thus, § 136v(a), based solely on a reading of the statutory text, should be interpreted to explicitly authorize local government regulation.

Finally, 7 U.S.C. § 136t(b) (emphasis added) of FIFRA, states that:

> The Administrator [of the Environmental Protection Agency] shall cooperate with the Department of Agriculture, any other Federal agency, and any appropriate agency of any State or any *political subdivision* thereof, in carrying out the provisions of this subchapter, and in *securing uniformity of regulations*.

This provision clearly indicates that political subdivisions were intended to have the ability to coregulate. To hold otherwise would make the directive to the Administrator to cooperate with agencies of political subdivisions to secure uniformity of regulations meaningless.

In sum, Congress, by using statutory language in FIFRA that actually supports concurrent local governmental regulation, by failing to *expressly* prohibit local regulation, and by providing legislative history that is at best ambiguous, did not demonstrate a "clear and manifest purpose" to preempt the historic police powers of local governments to regulate for their citizens' health,

safety, and welfare. Therefore, this Court's decisions require that no preemption be found.

B. FIFRA Cannot Be Interpreted to Prohibit States from Delegating their Authority to Regulate to their Political Subdivisions Without Violating the Fundamental Sovereign Power of the States to Determine For Themselves the Structure of their Governmental Institutions and Lawmaking Processes.

If this Court were to conclude that Congress, in enacting FIFRA, clearly and manifestly intended to preempt local governmental regulation, FIFRA would be an unconstitutional intrusion into the very heart of State sovereignty. To dictate to a State that it may regulate pesticide use at the State level but may not delegate some of that authority to its political subdivisions is, essentially, to tell the State how to govern itself. There can be no more fundamental aspect of State sovereignty than the State's power to decide for itself how to structure its own governmental institutions and how to enact and execute its laws.

If FIFRA is interpreted to bar local governmental regulation, then the States are forced to regulate at the State level and are absolutely prohibited from choosing to delegate some or all of their regulatory power to local units of government, even though the States may have made the fundamentally sovereign decision that pesticide regulation is best carried out at the local level. This usurpation of State sovereign authority is inconsistent with principles of federalism inherent in the Constitution. As Professor Tribe has so cogently stated:

> The most fundamental threats to state sovereignty – those that genuinely portend reduction of the states into 'field offices of the national bureaucracy' or 'bureaucratic puppets of the Federal Government' – would seem to arise less from federal laws that impose *substantive* constraints on state and private actors alike (such as the wage and hour provisions at issue in *National League of Cities v. Usery*) than from federal laws that *restructure* the basic institutional design of the system a state's people choose for governing themselves.

L. Tribe, American Constitutional Law 397 (1988) (citations omitted). If FIFRA bars local regulation, then it will restructure the basic governmental institutional design of all those States which have chosen to have their political subdivisions exercise regulatory power for the health, safety, and welfare of their citizens. Thus, unlike the law in *Usery* and *Garcia* which only imposed substantive restraints on private and State actors alike and did nothing to alter the basic governmental institutional structure of the states, the Wisconsin Supreme Court's interpretation of FIFRA acts peculiarly on States, and not private parties, and most importantly imposes a "states only" institutional lawmaking structure on the states.

Thus, amici States' position is not weakened by *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 554 (1985) (overruling *Usery*), which held only that there was "nothing in the overtime and minimum-wage requirements of the [FLSA Act], as applied to [the City Transit Authority] that is destructive of state sovereignty . . . . [The Authority] faces nothing more than the same minimum-wage and overtime obligations that hundreds

of thousands of other employers, public as well as private, have to meet." This Court has yet to uphold a federal law that, unlike the FLSA, so fundamentally intrudes into state sovereign authority as FIFRA would under the Wisconsin Supreme Court's interpretation. Thus, even Professor Tribe, a harsh critic of *Usery*, has suggested that it is unconstitutional for Congress to impinge on a State's "authority to decide, consistent with equal protection of the laws, *how* one's people will represent themselves and participate in their own governance [because that authority] seems the very essence of *all* self-government." Tribe, *supra*, at 398.

Had Congress, for example, allowed States to regulate pesticide use on the condition that all such state laws be passed by a lower house consisting of 50 members, then passed by an upper house of 30 members, with an 80% quorum requirement, and then signed by the Governor within 2 days, such a law would have been a flagrantly unconstitutional intrusion into the States' sovereign authority to decide for themselves their appropriate governmental lawmaking structure and procedure. Yet, such a requirement is qualitatively no more intrusive than is FIFRA, if interpreted to preempt local regulation. For FIFRA, so interpreted, tells States that they may only govern themselves in a matter directly affecting the health and safety of its people by invoking the state lawmaking institutions, and may not choose to allocate any decisionmaking power over pesticide matters to local governmental units even though the latter may be the best equipped to deal with the matter and the most accountable to the affected people. Although the *wisdom* of a State's sovereign policy decision to allocate power to

local entities is not relevant to the federalism question, the point is that it is solely and exclusively the State's authority to make that decision for itself, without interference from the federal government.

In *Federal Energy Regulatory Commission v. Mississippi* ("FERC"), 456 U.S. 742, 771-75 (1982), Justice Powell, dissenting in part, singled out certain procedural provisions of PURPA as violative of the Tenth Amendment. Those provisions imposed federal procedures on state regulatory institutions, by directing, *inter alia*, that the Secretary of Energy may intervene and participate as a matter of right in State regulatory proceedings respecting electrical rates. Said Justice Powell, "I know of no other attempt by the Federal Government to supplant state-prescribed procedures that in part define the nature of their administrative agencies. [] Congress may [not] do this." (Justices O'Connor and Rehnquist, and then Chief Justice Burger went further and struck down two entire Titles of PURPA).

The analogy is clear. If it violates the Tenth Amendment and principles of federalism for Congress to impose such minimally intrusive (relatively speaking) procedural requirements upon State regulatory agencies, then surely it is unconstitutional to impose a complete lawmaking regime upon an entire State, by dictating that all pesticide laws be promulgated at the State level using State branches of government, and that no lawmaking occur at the local level.

It is true that a bare majority of the Court in *FERC* sustained the entire PURPA Act, including certain procedural requirements, stating that:

> Congress could have pre-empted the field . . . ; PURPA should not be invalid simply because, out of deference to state authority, Congress adopted a less intrusive scheme and allowed the States to continue regulating in the area on the condition that they consider the suggested federal standards. . . .
>
> . . . .
>
> [Turning to certain procedural requirements PURPA imposes upon state regulatory agencies, the Court then stated:] If Congress can require a state administrative body to consider proposed regulations as a condition to its continued involvement in a pre-emptible field – and we hold today that it can – there is nothing unconstitutional about Congress' requiring certain *procedural minima* as that body goes about undertaking its tasks.

FERC, 456 U.S. at 765, 771 (emphasis added). Although the majority felt that the imposition of certain "procedural minima" would not run afoul of the Constitution, surely they did not intend that even a complete supplantation of a State's lawmaking procedures (which is the result of the Wisconsin Supreme Court's decision) would be upheld simply because Congress could have preempted the entire field. For even the majority in *FERC* and in *Garcia* acknowledged that certain intrusions into state sovereignty could not be justified regardless of Congress' authority to preempt the entire field. *See FERC*, 456 U.S. at 742 n.32 (acknowledging that Congress may not 'dictate the agendas and meeting places of state legislatures'); *Garcia*, 459 U.S. at 547, 556 (admitting that there are limits on the Federal Government's power to interfere with state functions, and citing *Coyle v. Oklahoma*, discussed infra).

Indeed, none of the Justices have ever suggested that *Coyle v. Oklahoma*, 221 U.S. 559 (1911), is other than good law. In that case, this Court held that Congress, in the exercise of its power to admit States to the Union, could not condition such admission on federal control over the location of a state's capital. It was no argument that Congress could have refused to admit the State of Oklahoma at all, and thus it could go less far and admit the State on any condition. *See Coyle*, 221 U.S. at 565. Rather, the Court stated:

> The power to locate its own seat of government and to determine when and how it shall be changed from one place to another . . . are essentially and peculiarly state powers.
>
> . . . .
>
> . . . The legislation in the Oklahoma enabling act relating to the location of the capital of the State, if construed as forbidding a removal by the State after its admission as a State, is referable to no power granted to Congress over the subject, and if it is to be upheld at all, it must be implied from the power to admit new States. [No such implicit power exists].

Coyle, 221 U.S. at 565, 574. Therefore, at least where certain fundamental intrusions into State sovereignty are involved, it is no argument that because Congress could have denied Statehood altogether (*Coyle*), or preempted the entire field (the case at bar), it may "go less far" and grant Statehood, or allow State regulation, upon any conditions whatsoever. Although this "go less far" argument has commanded the majority of this Court in decisions like *FERC* involving *lesser* intrusions into State sovereignty, this Court has never applied it in the context of

the most severe invasions of State authority such as occurred in *Coyle*. And, as noted above, the *FERC* and *Garcia* majorities themselves acknowledged that there are limits to federal encroachment on state powers.

Amici States contend that the intrusion into State sovereignty that results from the Wisconsin Supreme Court's decision is even more severe than the intrusion condemned in *Coyle*. For while dictating the location of a State's capital is admittedly a significant interference with the sovereign authority of a State to govern itself, there is no intrusion (except geographically) into the State's ability to decide how best to structure its lawmaking institutions. At worst, lawmakers, the governor, and lobbyists are forced to travel to a certain place, and buildings to house the branches of government must be built there, but the institutional structure is still left to the decision of the State. In our case, however, a most significant aspect of the decisi- nmaking structure of State government is dictated by Congress. The States are being precluded from delegating certain regulatory responsibilities to local governments, and are thereby forced to legislate in the entire area of pesticide use through *state* organs of government. The intrusion into State sovereignty here seems indubitably far greater than that found impermissible in *Coyle*.

There need be no fear by those in the *Garcia* majority that a recognition of State sovereign authority in this case would lead to the return of *Usery*, for this case, like *Coyle*, involves a peculiarly intrusive incursion on State governmental processes, not found in most federal legislation. And nothing in a decision restricting federal interference with state institutional design would prevent the federal

government from protecting individual rights pursuant to other Constitutional provisions. For example, a State's sovereign decision to allow only those cities that have a white majority population to coregulate would obviously have to yield to the equal protection clause.

In conclusion, the Wisconsin Supreme Court's decision violates the Tenth Amendment or general principles of federalism embodied in the Constitution by depriving States of their sovereign authority to choose to delegate lawmaking power over pesticide use to their local units of government.

CONCLUSION

For the foregoing reasons, we respectfully request that the decision of the Wisconsin Supreme Court be reversed.

Dated: Honolulu, Hawaii, February 28, 1991.

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